

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

BS172934

**ADRIAN RISKIN VS LARCHMONT VILLAGE PROPERTY
OWNERS ASSOCIATI**

June 4, 2019

9:30 AM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N DiGiambattista
Courtroom Assistant: B Hall

CSR: S Brock/CSR 10025
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Petitioner(s): Abenicio J. Cisneros (x)

For Respondent(s): Larchmont Village Property Owners Asociat BY: J.T. Cairns (x)

NATURE OF PROCEEDINGS: HEARING ON PETITION FOR WRIT OF MANDATE

Matter comes on for hearing. All counsel are provided with the court's tentative ruling.

Counsel for respondent's oral request to continue the hearing is made, argued and denied for the reasons set forth by the court on the record.

The court adopts its tentative ruling as the order of the court and is set forth in this minute order.

Petitioner Adrian Riskin ("Petitioner") petitions for a writ of mandate directing Respondent Larchmont Village Property Owners Association ("Respondent") to conduct an additional search for, and to produce, records responsive to Petitioner's requests for public records.

Judicial Notice

Petitioner's RJN Exhibits A, B – Granted.

Statement of Facts

Respondent is a property owners' association pursuant to the Property and Business Improvement District Law of 1994, California Streets & Highway Code §§ 36600, et seq. Respondent contracts with the City of Los Angeles and other entities to manage the Larchmont Village Business Improvement District ("the BID"). Respondent is subject to the CPRA both as a matter of state law and under the terms of its contract with the City of Los Angeles. (Pet. ¶ 6; RJN Exh. A; Streets & Highways Code § 36612.)

Petitioner's CPRA requests

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This writ action concerns three CPRA requests Petitioner submitted to Respondent in April and May 2017. (Riskin Decl. ¶ 2.)

Request 1

The April 16, 2017, request ("Request 1") sought three categories of records: (1) emails between anyone at the BID and anyone at the domains "lacity.org" or "lapd.online" from between January 1, 2016, and March 31, 2017; (2) copies of the minutes of BID board meetings which took place on October 13, 2014, October 15, 2015, and October 12, 2016; and (3) contracts between the BID and any consultants it used during its most recent renewal process. 1 (Riskin Decl. Exh. A.)

After Respondent failed to respond within 10 days as directed by Cal. Gov. Code section 6253(c), Petitioner sent a follow-up email on May 2, 2017. (Riskin Decl. ¶ 3, Exh. B.) Petitioner sent a second follow-up email on May 11, 2017. (Ibid.) On February 17, 2018, having received no response for 10 months, Petitioner sent a final follow-up message. (Ibid.) Respondent did not respond prior to the filing of the writ petition. (Riskin Decl. ¶ 4.)

Request 2

The April 17, 2017, request ("Request 2") sought two categories of records: (1) agendas for all BID board meetings from January 1, 2014, through "the present"; and (2) all emails between anyone at the BID—staff or board member—from October 2016 that relate to the October 2016 board meeting and, if those emails were very few, all emails related to the operation of the BID from October 2016. (Riskin Decl. Ex. A.)

After Respondent failed to respond within 10 days, Petitioner sent a follow-up email on April 28, 2017. (Riskin Decl. ¶ 3, Exh. B; Pet. ¶ 23, Exh. G.) After receiving no response, Petitioner sent a second follow-up email on May 11, 2017. (Riskin Decl. Exh. B.) Respondent responded on May 16, 2017, but failed to provide records, confirm the existence of records, or provide a determination of disclosability. Rather, Respondent stated that it was reviewing the request and expected to respond further within 14 days. (Riskin Decl. ¶ 4, Exh. C.) Respondent did not respond further within 14 days. (Ibid.) Hearing nothing from Respondent regarding the request, Petitioner sent a final follow-up email regarding Request 2 on February 17, 2018. (Riskin Decl. ¶ 3, Exh. B.) Respondent did not respond. (Riskin Decl. ¶ 4.)

Request 3

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The May 2, 2017, request sought a single category of records: electronic copies of all material distributed at the BID's May 2, 2017, board meeting. (Riskin Decl. ¶ 2, Exh. A.) After Respondent failed to respond within 10 days, Petitioner sent a follow-up email on May 30, 2017. (Riskin Decl. ¶ 3, Exh. B.) In addition to inquiring as to the status of Request 3, Petitioner informed Respondent of its duties under the Brown Act and offered to inspect the records in person upon request. (Ibid.) Respondent did not respond. (Riskin Decl. ¶ 4.) Petitioner sent a final follow-up email on February 17, 2018. (Riskin Decl. ¶ 3, Exh. B.) Respondent did not respond prior to Petitioner filing the petition on March 20, 2018. (Riskin Decl. ¶ 4.)

Petitioner Files Petition; No Answer Filed

On March 20, 2018, Petitioner filed his verified petition for writ of mandate. On April 26, 2018, Petitioner filed proof of service of the verified petition on Respondent by personal service on April 3, 2018.

A trial setting conference was held July 10, 2018, and was attended by counsel for Petitioner and Respondent. The court set the petition for hearing on May 16, 2019 and set a briefing schedule. Petitioner's opening brief was due 60 days before the hearing, the opposition 30 days, and the reply 15 days. The court also set a deadline of August 10, 2018 for Respondent to file an answer or other response to the petition. The minute order states that "all papers are to be personally served unless counsel stipulate to an alternate form of same-day service." Notice of this order was waived.

Respondent did not file an answer, or any other response, to the petition. Accordingly, the factual allegations of the writ petition are accepted as true. (CCP § 1094; Bank of America, N.A. v. Sup.Ct. (2013) 212 Cal.App.4th 1076, 1084 ["In the absence of a true return, all well-pleaded and verified allegations of the writ petition are accepted as true."].)

On March 14, 2019, Petitioner filed his opening brief in support of the writ petition and supporting declarations. On April 18, 2019, Petitioner filed proof of service of the opening brief, showing personal service on Respondent on March 15, 2019. No opposition brief to the writ petition was filed.

The court held a hearing on the writ on May 16, 2019. Respondent's counsel contended that Respondent did not file an answer or any opposition to the petition because Respondent had not been properly served. Respondent's counsel asserted that he had made a "special appearance" at the July 10, 2018 trial setting conference and had informed the court Respondent had not been

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properly served. The court continued the hearing until June 4, 2019 so that the transcript of the July 10, 2018 hearing could be obtained.

Respondent Made a General Appearance.

The July 10, 2018 transcript shows that Mr. Cairns, counsel for Respondent, appeared telephonically at the trial setting conference. Mr. Cairns stated his appearance for Respondent, and at no time indicated he was making a "special appearance." Nor did Mr. Cairns at any time indicate Respondent was contesting service. Mr. Cairns asked to draw the court's attention to the fact Petitioner had filed many similar lawsuits against business improvement districts. The court indicated counsel could file a notice of related cases if he so wished. The court set the trial date and briefing schedule without objection from counsel.

The court then asked Mr. Cairns if Respondent was planning to respond to the petition, after which the following statement was made by Mr. Cairns:

"Yes, your honor. I believe we are. The statute – the explicit statute that's mentioned in the petition, and under which he is being sued, is section 6258 of the Government Code, and which is a portion of the Public Records Act. That section provided – it says the times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court, and I'm not aware of any such setting yet. I'd ask your honor maybe for – oh, I've got a vacation planned – maybe 45 or 60 days to file a response to the petition?"

The court set the date for the responsive pleading to be filed. Mr. Cairns then stated "Okay. We will file a response by the 10th of August."

Respondent made a general appearance at the trial setting conference. "A general appearance occurs where a party, either directly or through counsel, participates in an action in in some manner which recognizes the authority of the court to proceed. It does not require any formal or technical act." *Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1756. Having made a general appearance, Respondent waived its right to bring a motion to quash under CCP §418.10.

Respondent Produces Some Responsive Records

Respondent produced a portion of the responsive records via emails sent by the Respondent's attorney on September 14, 2018, ("Batch 1") and November 5, 2018 ("Batch 2"). (Cisneros Decl.

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¶¶ 2, 3.) The responsive records included several emails responsive to Request 1.1, a contract responsive to Request 1.3, and three meeting agendas responsive to Request 2.1. (Riskin Decl. ¶¶ 6, 7.) However, the production contained many nonresponsive records. (Cisneros Decl. ¶¶ 2, 3.) Further, Petitioner contends that no records were provided in response to Requests 1.2, 2.2, or 3.1. (Cisneros Decl. ¶¶ 7, 8, 9.) The court further discusses the adequacy of Respondent's search and production of records in the Analysis section below.

Summary of Applicable Law

Pursuant to the CPRA (Gov. Code § 6250, et seq.), individual citizens have a right to access government records. In enacting the CPRA, the California Legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250; see also *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 63.) To facilitate the public's access to this information, the CPRA mandates, in part, that:

[E]ach state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available . . ." (Gov. Code § 6253(b).)

The CPRA defines "public records" subject to its provisions as follows:

(e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975. (Gov. Code § 6252(e).)

"The definition is broad and intended to cover every conceivable kind of record that is involved in the governmental process." (*Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1418.)

While the CPRA provides express exemptions to its disclosure requirements, these exemptions must be narrowly construed and the agency bears the burden of showing that a specific exemption applies. (*Sacramento County Employees' Retirement System v. Superior Court* (2013) 195 Cal.App.4th 440, 453.)

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“Records requests ... inevitably impose some burden on government agencies. An agency is obliged to comply so long as the record can be located with reasonable effort.” (California First Amendment Coalition v. Sup.Ct. (1998) 67 Cal.App.4th 159, 165-166.)

“Reasonable efforts do not require that agencies undertake extraordinarily extensive or intrusive searches, however. [Citation.] In general, the scope of an agency's search for public records ‘need only be reasonably calculated to locate responsive documents.’” (City of San Jose v. Sup.Ct. (2017) 2 Cal.5th 608, 627.) “CPRA does not prescribe specific methods of searching for those documents. Agencies may develop their own internal policies for conducting searches. Some general principles have emerged, however. Once an agency receives a CPRA request, it must ‘communicate the scope of the information requested to the custodians of its records,’ although it need not use the precise language of the request. [Citation.] As to requests seeking public records held in employees' nongovernmental accounts, an agency's first step should be to communicate the request to the employees in question. The agency may then reasonably rely on these employees to search their own personal files, accounts, and devices for responsive material.” (Id. at 627-628.)

Analysis

Petitioner contends that his CPRA requests sought disclosable records that Respondent had a duty to produce; that Respondent failed to produce records before this litigation was filed; and that Respondent's post-litigation production is incomplete. (Opening Brief (OB) 6-12.) For this writ proceeding, the pertinent legal issues are whether Petitioner has shown that (1) Respondent has not produced responsive, non-exempt public records; and/or (2) that Respondent has failed to conduct a reasonable search for responsive records.

Petitioner Seeks Public Records

Respondent is subject to the CPRA both as a matter of state law and under the terms of its contract with the City of Los Angeles. (Pet. ¶ 6; RJN Exh. A; Streets & Highways Code § 36612.) All of Petitioner's CPRA requests at issue appear to seek public records, including (1) emails of agency officials regarding public business, and (2) materials related to BID board meetings. Unless an exemption applies, emails by agency officials about public business are subject to the CPRA, even if located on private accounts or devices. (See City of San Jose, *supra*.)

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No Claimed Exemptions

The agency bears the burden of showing that a specific exemption applies. (Sacramento County Employees' Retirement System v. Superior Court (2013) 195 Cal.App.4th 440, 453.) Respondent has asserted any CPRA exemptions and has not shown that any exemptions apply.

Respondent's Post-Litigation Production is Incomplete

Respondent failed to provide any records prior to Petitioner's filing of the writ petition. After the petition was filed, Respondent produced records on September 14, 2018 and November 5, 2018 (Batch 1 and Batch 2, respectively.) Petitioner contends that Respondent's production was incomplete and that Respondent did not conduct a reasonable search for responsive records. (OB 10-12.) Petitioner has supported both arguments with evidence and reasoned analysis, as discussed below. Respondent has not responded to the opening brief and apparently concedes its production and search were incomplete.

Request 1.1

Request 1.1 seeks emails between anyone at the BID, "staff or board," and anyone at either lacity.org or lapd.online from January 1, 2016 to March 31, 2017. With Batch 1, Respondent produced one responsive email from December 2016. (Riskin Decl. ¶ 6.) Respondent did not produce any responsive emails between BID and LAPD. (Cisneros Decl. ¶ 9.) Through a separate CPRA request to the Los Angeles City Clerk, non-party Anna von Herrmann obtained the following records from City on February 26, 2018: a January 4, 2017 email from the City Clerk's office (with an "lacity.org" email) to BID President Tom Kneafsey; an email thread from February 3, 2017 between Kneafsey and City regarding BID insurance; and a March 1, 2017 email between BID co-executive directors Heather Boylston and Rebecca Hutchinson and City. (von Herrmann Decl. ¶ 4, Exh. C.) These emails appear responsive to request 1.1, and were not produced by Respondent to Petitioner. Thus, it appears Respondent has additional responsive records within its possession or has not conducted an adequate search. Respondent has not argued to the contrary.

Request 1.2

Request 1.2 seeks minutes from three BID board meetings held October 13, 2014, October 15, 2015, and October 12, 2016. It is reasonable to infer that the BID maintains minutes of its board meetings. Petitioner's attorney declares that neither Batch 1 nor Batch 2 included records

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responsive to this request. (Cisneros Decl. ¶ 8.) With its production, Respondent did not include a letter explaining which documents were responsive to which requests or clarifying whether Respondent withheld any records subject to exemption. (Id. ¶¶ 2-3.) Respondent does not oppose this evidence, which supports that Respondent has not adequately responded to Request 1.2 or has not conducted an adequate search.

Request 1.3

Request 1.3 seeks the contract with any consultants that assisted with the BID's most recent renewal of its contract with City. Respondent produced an adequate response to this request. (See OB 11:5-6.)

Requests 2.1 and 3.1

Request 2.1 seeks agendas from Board meetings from 2014. Request 3.1 seeks all materials distributed at the BID's May 2017 Board meeting.

In Batch 1, Respondent produced agendas for three meetings: May 22, 2014, May 18, 2016, and May 24, 2018. (Riskin Decl. ¶ 6.) Petitioner submits evidence that the BID board held meetings on other dates since 2014, including October 12, 2016 and May 2, 2017. (von Herrmann Decl. ¶¶ 2-3, Exh. A, B.) The BID is required to publish all board meeting agendas. (Gov. Code § 54954(a).)

Petitioner's attorney declares that neither Batch 1 nor Batch 2 included records responsive to Request 3.1. (Cisneros Decl. ¶ 8.) Petitioner also submits evidence to support that BID distributed materials at the May 2017 BID board meeting, including a biography of a new board member and revised bylaws to be evaluated. (von Herrmann Decl. ¶3, Exh. B.) Information distributed at a meeting subject to the Brown Act is public and disclosable. (Gov. Code § 54957.5(a).)

It is reasonable to infer Respondent has additional, responsive records for Requests 2.1 and 3.1 that it did not produce, or that it did not conduct a reasonable search. Also, Respondent has not claimed any exemptions, asserted that it produced all responsive records, or asserted that it had no responsive records in its possession.

Request 2.2

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Request 2.2 seeks internal BID emails relating to the October 2016 board meeting, or emails related to operation of the BID in October 2016. The request seeks public records. Petitioner's attorney declares that neither Batch 1 nor Batch 2 included records responsive to Request 2.2. (Cisneros Decl. ¶ 8.) Given the deficiencies in Respondent's search, discussed above, it is reasonable to infer that Respondent did not conduct a sufficient search for records responsive to this request.

In addition to the analysis above, for Requests 1.1, 1.2, 2.1, 2.2, and 3.1, Respondent has not claimed any exemptions, asserted that it produced all responsive records, or asserted that it had no responsive records in its possession.

The petition is GRANTED as to Requests 1.1, 1.2, 2.1, 2.2, and 3.1, as discussed above.

Attorney's Fees

In a CPRA action, "the court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section." (Gov. Code § 6259(d).) Petitioner is the prevailing party. Petitioner may bring a separate motion for attorney's fees. (OB 12; Gov. Code § 6259(d).)

Conclusion

The petition is GRANTED as to Requests 1.1, 1.2, 2.1, 2.2, and 3.1, as discussed above. Counsel for Petitioner to lodge and serve a proposed order directing Respondent to conduct an additional search for, and to produce, non-exempt records responsive to those requests.

FOOTNOTE:

1- Like Petitioner, the court refers to these subparts as Requests 1.1., 1.2, and 1.3, respectively. The court uses the same format (i.e. Requests 2.1 and 2.2) for the two subparts of Request 2.

Counsel for petitioner is to give notice and to prepare, serve and e-file the proposed order, along with a declaration which states whether counsel for respondent has any objections to the proposed order. The court will hold the proposed order ten days if there are objections.